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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Solomy Balungi Bossa, Presiding  
Bakhtiyar Tuzmukhamedov  
Mparany Rajohnson

**Registrar:** Adama Dieng

**Date:** 14 July 2010

**THE PROSECUTOR**

v.

**Callixte NZABONIMANA**  
*Case No. ICTR-98-44D-T*

RECEIVED  
SECRETARY GENERAL'S OFFICE  
14 JULY 2010

**DECISION ON NZABONIMANA'S MOTION FOR RECONSIDERATION AND/OR  
CERTIFICATION OF THE "DECISION ON NZABONIMANA'S MOTION FOR THE  
VARIATION OF ITS LIST OF WITNESSES", RENDERED ON 4 JUNE 2010**

*(Rule 73 (B) of the Rules of Procedure and Evidence)*

**Office of the Prosecutor**

Paul Ng'arua  
Memory Maposa  
Simba Mawere  
Diana Karanja

**Defence Counsel**

Vincent Courcelle-Labrousse  
Philippe Laroche

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## INTRODUCTION

1. On 9 November 2009, during the first day of trial in the instant proceedings and immediately prior to the commencement of the Prosecution case, the Trial Chamber issued an oral order that all responses to motions be filed within five days, and that any replies be filed within three days of a response, unless otherwise specified ("Filing Deadline").<sup>1</sup>
2. On 3 February 2010, the Trial Chamber ordered the Defence to produce a list of witnesses it intended to call at trial, with identifying information for each witness, as well as information concerning the facts and points in the Indictment to which each witness would testify ("Proofing Chart").<sup>2</sup>
3. On 26 March 2010, after the repeated failure of the Defence to abide by the Trial Chamber's orders to significantly reduce its list of prospective witnesses to a number that was realistic and proportionate to that called by the Prosecution,<sup>3</sup> the Trial Chamber issued a Decision in which it ordered the Defence to file, no later than 31 March 2010, a list of 30 Defence witnesses ("26 March Order").<sup>4</sup>
4. On 31 March 2010, the Defence filed its Proofing Chart.<sup>5</sup>
5. On 6 April 2010, the Defence filed a Motion for Reconsideration or Certification for Interlocutory Appeal of the 26 March Order ("6 April Motion").<sup>6</sup> In an Annex to that Motion, the Defence indicated the names of 14 additional witnesses it would like to call should its request for Reconsideration be granted.<sup>7</sup>

<sup>1</sup> Trial Transcript, 9 November 2009, p. 10 (English).

<sup>2</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Order on Defence Disclosure, 3 February 2010.

<sup>3</sup> For a detailed procedural history of the events leading up to the Instant Decision, see Impugned Decision, *infra* fn 14, paras. 1-15.

<sup>4</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010, 26 March 2010.

<sup>5</sup> Annexe I (strictement confidentielle) – Au 31 mars 2010, contained in confidential email from Philippe Laroche dated 31 March 2010. The Defence filed a Proofing Chart as part of a confidential letter from Philippe Laroche dated 12 March 2010, though this chart lacked any summaries of prospective Defence witness testimony. The Defence also filed a revised Proofing Chart on 16 April 2010, containing the particulars of only the 30 witnesses permitted by the 26 March Order. See *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Annexe I au Mémoire Préable à la Défense: Liste des Témoins Conformément à L'Ordonnance du 14 Avril 2010.

<sup>6</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Extremely Urgent Motion for Reconsideration or Certification of the "Consolidated Decision on Prosecutor's Second and Third Motions to Compel the Defence to Comply with the Trial Chamber's Decision of 3 February 2010", Rendered on 26 March 2010, 6 April 2010.

<sup>7</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Annex "A" Nzabonimana's Suggested Names of 44 Witnesses and Proofing Chart in Support of Motion for Reconsideration, 6 April 2010.

6. On 7 May 2010, the Trial Chamber issued a Decision on the 6 April Motion, in which the Chamber denied Certification but granted Reconsideration in part ("Reconsideration Decision").<sup>8</sup> Specifically, the Trial Chamber allowed the Defence to add to its witness list, from the additional 14 witnesses proposed in the 6 April Motion, those witnesses who would testify to paragraphs of the Indictment that the Defence had identified as requiring rebuttal and where less than 4 witnesses were scheduled to testify.<sup>9</sup> The Trial Chamber further ordered that the Defence could not present more than 4 witnesses with respect to any such paragraph.<sup>10</sup>
7. On 19 May 2010, the Defence filed a Motion ("19 May Motion"), wherein it sought to add witnesses to its list pursuant to the Reconsideration Decision, as well as drop and add other witnesses pursuant to Rule 73 *ter* (E) of the Rules of Procedure and Evidence ("Rules").<sup>11</sup>
8. On 24 May 2010, the Prosecution filed a Response to the 19 May Motion.<sup>12</sup>
9. On 31 May 2010, the Defence filed a Reply to the Prosecution Response, missing the three-day Filing Deadline ("Time-Barred Reply").<sup>13</sup>
10. On 4 June 2010, the Trial Chamber issued a Decision with respect to the 19 May Motion ("Impugned Decision"),<sup>14</sup> in which it granted the relief sought by the Defence in part, allowing the Defence to add certain witnesses to its list while restricting the permissible scope of their testimony.

<sup>8</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Extremely Urgent Motion for Reconsideration or Certification of the "Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with the Trial Chamber's Decision of 3 February 2010", Rendered on 26 March 2010, 7 May 2010.

<sup>9</sup> Reconsideration Decision, para. 44.

<sup>10</sup> Reconsideration Decision, disposition.

<sup>11</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Motion for the Variation of its List of Witnesses, 19 May 2010.

<sup>12</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for the Variation of its List of Witnesses, 24 May 2010.

<sup>13</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Reply to Prosecutor's Response to "Nzabonimana's Motion for the Variation of its List of [sic] Witnesses", 31 May 2010.

<sup>14</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for the Variation of its List of Witnesses, 4 June 2010.

Decision on Nzabonimana's Motion for Reconsideration and/or Certification of the "Decision on Nzabonimana's Motion for the Variation of its List of Witnesses", Rendered on 4 June 2010

11. On 11 June 2010, the Defence filed a Motion for Reconsideration or Certification of the Impugned Decision ("Instant Motion").<sup>15</sup>
12. On 15 June 2010, the Prosecution filed a Response to the Instant Motion ("Instant Response").<sup>16</sup>
13. On 18 June 2010, the Defence filed a Reply to the Prosecution Response ("Instant Reply").<sup>17</sup>

## SUBMISSIONS OF THE PARTIES

### *Instant Motion*

#### Reconsideration

14. The Defence's principal argument in support of Reconsideration is that the Trial Chamber abused its discretion<sup>18</sup> when it rendered the Impugned Decision, for three reasons: 1) it refused to consider the Time-Barred Reply; 2) it limited the permissible scope of the testimony to be adduced by the witnesses added to the Defence list; and 3) it refused to allow the Defence to add Witnesses T56 and T161 to its list.<sup>19</sup>
15. With respect to the Time-Barred Reply, the Defence concedes that "[a]lthough it is very possible that the Trial Chamber ordered at some point that replies in the Chamber had to be filed three days after responses, the Defence submits, first that it has no recollection of such order and second that the practice which developed in the Chamber is rather to allow for a five days delay to reply".<sup>20</sup> Therefore, because the Trial Chamber has "always"<sup>21</sup> and "systematically"<sup>22</sup> considered replies filed in excess of the three-day deadline on prior

<sup>15</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana's Motion for Reconsideration and/or Certification of the "Decision on Nzabonimana's Motion for the Variation of its List of Witnesses", Rendered on 4 June 2010, 11 June 2010.

<sup>16</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for Reconsideration and/or Certification of the 'Decision on Nzabonimana's Motion for the Variation of its List of Witnesses', Rendered on 4 June 2010, 15 June 2010.

<sup>17</sup> *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Reply to Prosecutor's Response to Nzabonimana's Motion for Reconsideration and/or Certification of the "Decision on Nzabonimana's Motion for the Variation of its List of Witnesses", Rendered 4 June 2010, 18 June 2010.

<sup>18</sup> While the Defence's stated argument is that the Trial Chamber committed an abuse of discretion, the Instant Motion also contains scattered arguments that the Trial Chamber committed errors in law or that new facts have arisen since the issuance of the Impugned Decision that warrant Reconsideration. See e.g., paras. 3, 28, 33.

<sup>19</sup> Instant Motion, para. 10.

<sup>20</sup> Instant Motion, para. 4.

<sup>21</sup> Instant Motion, para. 12.

<sup>22</sup> Instant Motion, para. 14.

occasions, the Chamber's decision to "suddenly... ignore"<sup>23</sup> a reply filed in excess of this deadline "could leave [sic] a neutral observer to conclude that there is a certain degree of arbitrariness in the manner in which the Trial Chamber exercises its discretion".<sup>24</sup>

16. Regarding the limitation on the scope of testimony of witnesses allowed by the Impugned Decision, the Defence disavows that it ever "renounced to [sic] the other paragraphs on which the added and/or replaced witnesses were supposed to testify" according to its Proofing Chart.<sup>25</sup> Moreover, it avers that the Defence is left with, "on average", "less than two witnesses per paragraph of the Indictment" to "demonstrate that each of these allegations is false", to corroborate the Defence evidence, to "show the motives behind the false allegations", to provide "background socio-political evidence about Rwanda" and to adduce evidence of mitigating factors in the event of a conviction.<sup>26</sup> According to the Defence, the Chamber has created "an unjust advantage to the Prosecutor and breache[d] the principle of equality of arms", because "[w]hereas the Defence is only entitled to lead evidence on a given paragraph of the Indictment, the Prosecutor in his cross-examination is allowed to put its whole case to the witness", meaning that "the Prosecutor can seek further confirmation of its thesis, whereas the Defence is deprived of that right".<sup>27</sup>

17. Finally, the Defence essentially reiterates the same argument it advanced in its 19 May Motion in support of allowing witnesses T56 and T161 to testify with respect to paragraph 41 of the Indictment. Briefly, that argument states that despite the fact that over 10 Defence witnesses can testify to that paragraph, only two witnesses can provide "direct evidence" to rebut the actual evidence tendered by the Prosecution in relation to this paragraph at trial.<sup>28</sup> The Defence further argues that since the issuance of the Impugned Decision, a "new fact" has arisen that warrants Reconsideration; namely, that three Defence witnesses who were scheduled to provide "indirect" evidence with respect to paragraph 41 did not in fact do so at trial.<sup>29</sup> The Defence concludes that "denying the defendant the possibility to call at least the equivalent number of witnesses as the Prosecution breaches Mr. Nzabonimana's right to a fair trial".<sup>30</sup>

<sup>23</sup> Instant Motion, para. 12.

<sup>24</sup> Instant Motion, para. 13.

<sup>25</sup> Instant Motion, para. 20.

<sup>26</sup> Instant Motion, para. 22.

<sup>27</sup> Instant Motion, para. 24.

<sup>28</sup> Instant Motion, paras. 31-32.

<sup>29</sup> Instant Motion, para. 33.

<sup>30</sup> Instant Motion, para. 37.

Certification

18. The Defence reiterates its arguments in support of Reconsideration for the proposition that such issues would significantly affect the fair and expeditious conduct of proceedings and the outcome of trial.<sup>31</sup> As to whether an immediate resolution of the issue would materially advance the proceedings, the Defence announces that it "refuses to be bound by its Proofing Chart to determine the number of its witnesses", because "[w]hen that Chart was prepared in March and then amended in April 2010, the Defence had no idea that it would one day be used as the overriding tool to determine the witnesses it can call in support of the Defence of Nzabonimana".<sup>32</sup> The Defence then accuses the Trial Chamber of "following the indications contained in that Proofing Chart in a very narrow way and is limiting the Defence's evidence using what constituted an indication on the topics on which the Defence witnesses could testify or answer questions".<sup>33</sup> The Defence concludes that it "obviously never intended to have all the 44 witnesses testifying on all the paragraphs on which they could have testified".<sup>34</sup>

*Instant Response*

19. The Prosecution requests that the Reconsideration sought by the Defence be granted,<sup>35</sup> though it does not accept all the Defence arguments in support of that conclusion.

20. With respect to the refusal to consider the Time-Barred Reply, the Prosecution, citing a decision of this Chamber that pre-dates the issuance of the Filing Deadline, "notes that the Trial Chamber has previously held that the time limit within which to file a reply to a response should be five days",<sup>36</sup> and that "[w]here no specific deadlines have been given by the Chamber, the Defence has filed their replies to the Prosecutor's responses within the five day limit and the Chamber has always considered such filings in its decisions".<sup>37</sup> However, the Prosecution argues that the Time-Barred Reply is "merely a repeat of the main motion and it cannot be said that the Chamber was not abreast with the arguments of the parties".<sup>38</sup> Moreover, the Prosecution rejects the Defence argument that its Proofing Chart merely indicated the points in the Indictment about which each witness could (as opposed to would)

<sup>31</sup> Instant Motion, paras. 41-43.

<sup>32</sup> Instant Motion, para. 46.

<sup>33</sup> Instant Motion, para. 47. (emphasis in original)

<sup>34</sup> Instant Motion, para. 48.

<sup>35</sup> Instant Response, para. 3.

<sup>36</sup> Instant Response, para. 17; citing *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Defence Motion for the Postponement of the Start of Trial, 30 October 2009, para. 18.

<sup>37</sup> Instant Response, para. 18.

<sup>38</sup> Instant Response, para. 21.

testify as a "clear... misconception by the Defence of its obligations in terms of Rule 73 *ter* (B) (iii) (c)."<sup>39</sup>

21. Regarding the restricted scope of testimony for witnesses added by the Impugned Decision, the Prosecution requests the Chamber to allow each witness to testify about all the paragraphs indicated on the Proofing Chart, provided the Defence keeps to the time allocated for the completion of the Defence case.<sup>40</sup> With the same caveat, the Prosecution does not oppose allowing witnesses T56 and T161 to testify about paragraph 41 of the Indictment.<sup>41</sup>

22. In light of its agreement with the Defence on the issue of Reconsideration, the Prosecution makes no submissions on the issue of Certification.<sup>42</sup>

#### *Instant Reply*

23. In the Instant Reply, the Defence requests that the Trial Chamber give effect to the agreement of the parties on the issue of Reconsideration, and asks that the remainder of its Motion be considered moot.<sup>43</sup>

## DELIBERATIONS

### *Applicable Law*

#### Reconsideration

24. As this Tribunal has acknowledged in *Karemera*, it is the established jurisprudence of the Tribunal that Trial Chambers have the "inherent power" to reconsider their own decisions, under the following "exceptional" circumstances:

- i. when a new fact has been discovered that was not known by the Trial Chamber;
- ii. where new circumstances arise after the original decision;
- iii. where there was an error of law or an abuse of discretion by the Trial Chamber resulting in an injustice.<sup>44</sup>

<sup>39</sup> Instant Response, para. 20.

<sup>40</sup> Instant Response, paras. 26-27.

<sup>41</sup> Instant Response, para. 28.

<sup>42</sup> Instant Response, para. 29.

<sup>43</sup> Instant Reply, paras. 5-12.

<sup>44</sup> See e.g., *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera*, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 2; *Karemera*, Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY, 28 September 2007, paras. 10-11.

### Certification

25. Rule 73 (B) states:

Decisions rendered on [Trial Chamber] motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Thus, in order to grant Certification to appeal one of its Decisions, a Trial Chamber must find: 1) that the decision in question involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and 2) that an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.<sup>45</sup> Even where both factors are present, Certification is not automatic, but at the discretion of the Trial Chamber,<sup>46</sup> and Certification remains an exceptional measure.<sup>47</sup> As was noted in *Ntahobali*, "Rule 73(B) of the Rules provides... that in exceptional circumstances, the Trial Chamber may—not must—allow interlocutory appeals of [its] decisions".<sup>48</sup>

### Proofing Charts

26. Rule 73 *ter* (B) (iii) (c) states that

...the Trial Chamber... may order that the Defence, before the commencement of its case but after the close of the case for the prosecution, file the following:... (iii) A list of witnesses the Defence intends to call with:... (c) The points in the indictment as to which each witness will testify.

### *Preliminary Matters*

27. At the outset, the Trial Chamber recognises that the Defence and Prosecution have made concurring submissions on the issue of Reconsideration. While the Trial Chamber recognises that this is a persuasive factor that must be considered in its ultimate analysis, it is

<sup>45</sup> *Prosecutor v. Ngirabatware*, ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision dated 17 September 2009, 5 October 2009, para.16; citing *Prosecutor v. Milošević*, IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para. 2.

<sup>46</sup> *Ngirabatware*, para. 17. See also *Prosecutor v. Tolimir*, IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4.

<sup>47</sup> *Prosecutor v. Karemera et al.*, ICTR-98-44-NZ, Decision on Joseph Nizorera's Application for Certification to Appeal Decision on the 24<sup>th</sup> Rule 66 Violation, 20 May 2009, para. 2. See also *Prosecutor v. Nshogoza*, ICTR-07-91-T, Decision on Defence Motion for Certification of the Trial Chamber's Decision on Defence Urgent Motion for a Subpoena to Ms. Loretta Lynch, 19 February 2009, para. 4; *Ngirabatware*, para. 17.

<sup>48</sup> *Prosecutor v. Ntahobali et al.*, ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paras. 13-15.



not dispositive. The Trial Chamber remains well within its discretion to issue a Decision that may contradict concurring submissions made by the parties, if it considers that to be the correct outcome on the merits.

28. Furthermore, the Trial Chamber observes that the Defence has, once again, miscast certain basic principles of criminal law in support of its argument. As this Chamber has already noted,<sup>49</sup> it is an elementary principle of criminal law that the burden to prove the guilt of the Accused beyond a reasonable doubt lies on the Prosecution. The Appeals Chamber of this Tribunal has affirmed "that the presumption of innocence does not require the trial chamber to determine whether the accused is 'innocent' of the fact at issue; it simply forbids the trial chamber from convicting the accused based on any allegations that were not proven beyond a reasonable doubt".<sup>50</sup> Moreover, as this Tribunal has expressly noted, not only does the Defence have no obligation to adduce rebuttal evidence in order to obtain an acquittal,<sup>51</sup> but when the Defence elects to do so, "[i]t is not sufficient for the Chamber to prefer prosecution evidence to defence evidence"<sup>52</sup> and the "[r]efusal to believe or rely upon defence evidence does not automatically amount to a guilty verdict".<sup>53</sup> Hence, to the extent that the Defence claims that it is unable to "demonstrate that each of [the Prosecution] allegations is false"<sup>54</sup> or that it is unfair for the Prosecution to be allowed to seek "confirmation of its thesis, whereas the Defence is deprived of that right",<sup>55</sup> it is invoking a non-existent standard to buttress its claim that the Accused has been denied an adequate defence.

29. Finally, as a general observation, the Trial Chamber wishes to stress that it is utterly baffled by the Defence's assertion that it "refuses to be bound by its Proofing Chart to determine the number of its witnesses."<sup>56</sup> This evinces a clear and complete misunderstanding by the Defence of its obligations pursuant to Rule 73 *ter* (B) (iii) (c).<sup>57</sup> As for the Defence assertion that it "obviously never intended to have all the 44 witnesses testifying on all the paragraphs on which they could have testified",<sup>58</sup> the Defence appears to be insinuating that the Chamber should have either been clairvoyant or assumed the Defence was lying when it

<sup>49</sup> Reconsideration Decision, para. 32.

<sup>50</sup> *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement, para. 140.

<sup>51</sup> *Prosecutor v. Nchamihigo*, ICTR-01-63-T, Judgement and Sentence, 12 November 2008, para. 13; *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Judgement, 20 September 2006, para. 32.

<sup>52</sup> *Nchamihigo*, para. 12.

<sup>53</sup> *Nchamihigo*, para. 13.

<sup>54</sup> Instant Motion, para. 22.

<sup>55</sup> Instant Motion, para. 24.

<sup>56</sup> Instant Motion, para. 46.

<sup>57</sup> Instant Response, para. 20.

<sup>58</sup> Instant Motion, para. 48.

filed its Proofing Chart. Rule 73 *ter* (B) (iii) (c) unambiguously requires the Defence to provide a list of its prospective witnesses, including the points of the indictment to which each witness will testify. The reason for this mandatory language is simple: it provides the Prosecution and the Trial Chamber with a clear preview of the case the Defence will present, in order to avoid the element of surprise and facilitate the smooth conduct of proceedings. To suggest that the Defence is not subject to this binding disclosure obligation, and that its Proofing Chart merely provides an overview of the sphere of knowledge of its witnesses, would nullify the very purpose of Rule 73 *ter* (B) (iii) (c).

### *Analysis*

#### **Reconsideration**

##### Refusal to Consider the Time-Barred Reply

30. The Trial Chamber rejects the spurious argument that Defence's ignorance of a binding order issued in open court<sup>59</sup> is excused by the past practice of this Chamber, on a case-by-case basis, to consider replies filed after the Filing Deadline, where the content of the reply demonstrates that it is in the interests of justice to nevertheless consider the late submission. With respect to the Time-Barred Reply, the Chamber reviewed its content and concluded that it was essentially a reiteration of its Motion and would not have impacted the Impugned Decision, and thus no good cause had been shown why it was in the interests of justice to consider such submissions. Moreover, the Chamber notes that the five-day deadline for replies cited by the Prosecution refers to a decision that pre-dates the issuance of the Filing Deadline by 10 days,<sup>60</sup> in which the Trial Chamber invoked the default deadline provided by the Rules, and which was later abrogated by the Filing Deadline. For these reasons, the Chamber finds that it did not abuse its discretion in compelling the Defence to respect the three-day Filing Deadline.

##### Limiting the Scope of Testimony of Added Witnesses

31. First and foremost, the Defence cites no jurisprudence for its proposition that the Trial Chamber abused its discretion in limiting the prospective testimony of the witnesses it allowed to be added to the Defence list pursuant to the Impugned Decision. Indeed, the Impugned Decision explicitly cited precedent affirming a Trial Chamber's discretion to

<sup>59</sup> See *supra* fn 1.

<sup>60</sup> As noted *supra* at para. 20, the Prosecution cites a written Decision of the Trial Chamber on 30 October 2009, whereas the Filing Deadline, as noted *supra* at para. 1, was issued orally at the commencement of trial on 9 November 2009.

confine the prospective testimony of Defence witnesses added pursuant to a Rule 73 *ter* (E) motion, including where such witnesses replaced withdrawn witnesses.<sup>61</sup>

32. Furthermore, the Trial Chamber recalls the Defence argument that the Trial Chamber created an unjust advantage to the Prosecutor and breached the principle of equality of arms because "[w]hereas the Defence is only entitled to lead evidence on a given paragraph of the Indictment, the Prosecutor in his cross-examination is allowed to put its whole case to the witness".<sup>62</sup> However, this argument neglects to mention that the Defence enjoys an identical scope of inquiry when conducting its cross-examination of Prosecution witnesses, pursuant to Rules 85 (B) and 90 (G) (i)-(iii). The Trial Chamber finds no violation of the principle of equality of arms in affording the Prosecution the same scope of cross-examination that was enjoyed by the Defence during the presentation of the Prosecution case.

33. Moreover, the Trial Chamber recalls the Defence argument that "[t]he Chamber acknowledged in the Decision of 7 May 2010 that there were 27 different paragraphs of the Indictment supported by evidence" and that "[t]his means that on average, the Defence has less than two witnesses per paragraph of the Indictment".<sup>63</sup> This assertion is highly problematic for three reasons. First, the Trial Chamber never "acknowledged" the number of paragraphs for which the Prosecution has led evidence. As this Chamber has repeatedly emphasised, it will make no finding on the sufficiency of the evidence tendered in this trial until the entire case is complete. Rather, the Chamber simply noted that, according to a table produced by the Defence at paragraph 21 of the 6 April Motion ("Table"), the Defence indicated 27 paragraphs that, in its assessment, were supported by Prosecution evidence, and thus required rebuttal.<sup>64</sup> Second, if the Trial Chamber correctly understands the somewhat nebulous Defence submission that it has been confined to "less than two witnesses per paragraph of the Indictment", it would appear that the Defence is insinuating that the 38 witnesses that the Chamber has allowed the Defence to call are each only capable of testifying to a single paragraph of the Indictment among the 27 paragraphs identified in the Table as requiring rebuttal. A cursory inspection of the Defence Proofing Chart, as well as the testimony proffered by the Defence witnesses who have testified in this trial thus far, reveals this falsehood. Third, as the Appeals Chamber of the ICTY has clearly affirmed, "a

<sup>61</sup> Impugned Decision, para. 40; citing *Prosecutor v. Ndindiliyimana*, ICTR-2000-56-T, Decision on Augustin Bizimungu's Request to Vary his Witness List, 24 October 2007, paras. 12, 19-20.

<sup>62</sup> See para. 16, *supra*, citing Instant Motion, para. 24.

<sup>63</sup> Instant Motion, para. 22.

<sup>64</sup> 6 April Motion, para. 21; Reconsideration Decision, para. 41.

principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides" in an international criminal trial.<sup>65</sup> The Trial Chamber finds the Defence's suggestion that it has been limited to less than two witnesses per paragraph—even if it were true, which it is not—to advocate precisely such an impermissible exercise in arithmetic.

34. With this in mind, the Trial Chamber recalls its prior observation in the Reconsideration Decision that many of the paragraphs of the Indictment were already supported by ample Defence evidence, and that the Defence, through its 6 April Motion, was seeking to add a number of witnesses to its list that would provide redundant and repetitive testimony.<sup>66</sup> In order to avoid that result, the Trial Chamber, guided by the Defence submissions as to which paragraphs of the Indictment required rebuttal, allowed the Defence to add witnesses to those paragraphs identified in its Table where fewer than four Defence witnesses were scheduled to testify,<sup>67</sup> and imposed a cap of 4 witnesses per paragraph, after any additions had been made.<sup>68</sup> The Trial Chamber further recalls that despite the present protestations of the Defence that it "**never** renounced to [sic] the other paragraphs on which the added and/or replaced witnesses were supposed to testify following the Proofing Chart of 31 March 2010",<sup>69</sup> at no point in its 19 May Motion did the Defence indicate that the witnesses it proposed to add to its list pursuant to Rule 73 *ter* (E) would testify to any other paragraphs than those explicitly enumerated in its Motion.<sup>70</sup>

35. At paragraph 18 of the Instant Motion, the Defence produces the following table, which purports to illustrate how the Impugned Decision unduly restricts the prospective testimony of the witnesses that the Trial Chamber permitted to be added to the Defence list:

<sup>65</sup> *Prosecutor v. Prlić et al.*, IT-04-74-AR73.7, Decision on Defendants Appeal Against "Décision Portant Attribution du Temps à la Défense pour la Présentation des Moyens à Décharge", 1 July 2008, para. 19; citing *Prosecutor v. Orić*, IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para 7.

<sup>66</sup> Reconsideration Decision, para. 43.

<sup>67</sup> Paragraphs 21, 23, 24, 28, 32, 40, 44, 46, 47, 48, 49, 53, 54 and 58. See Reconsideration Decision, para. 44.

<sup>68</sup> Reconsideration Decision, disposition.

<sup>69</sup> Instant Motion, para. 20. (emphasis in original)

<sup>70</sup> See 19 May Motion, paras. 23-25.

	Paragraphs of the Indictment on which the witnesses can testify following table <sup>71</sup> of 31 March 2010	Paragraphs of the Indictment on which the witnesses can testify following the Decision of 4 June 2010
T134	8, 9, 10, 11, 12, 38, 47, 51	47
T150	8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 22, 26, 30, 31, 33, 35, 36, 37, 38, 39, 41, 43, 45, 50, 51, 52, 53, 54	53
T98	8, 9, 10, 11, 12, 38, 44, 49, 51, 58	44, 49, 58
T95	8, 9, 10, 11, 12, 38, 44, 51	44
T129	8, 9, 10, 11, 12, 32, 38, 51, 53, 54	32, 54
T116	8, 9, 10, 11, 12, 32, 38, 51, 53, 54	32
T61	8, 9, 10, 11, 12, 23, 38, 51	23
T97	8, 9, 10, 11, 12, 38, 44, 49, 51, 58	44, 49, 58
T110	8, 9, 10, 11, 12, 24, 34, 38, 40, 51	40
T76	8, 9, 10, 11, 12, 26, 38, 51	48

This table indeed creates the impression that the Defence has been severely hindered in its ability to present its case. However, that impression is highly misleading, for a number of reasons. First, what the Defence declines to acknowledge in the Instant Motion is that, according to the Defence Proofing Chart, every single paragraph (with the exception of paragraph 24) that the above table represents as having been lost as a result of the Impugned Decision is nevertheless still supported by at least 4, and in a number of cases more than 10, Defence witnesses. Second, paragraphs 8, 9, 10, 11, 12, 15, 18, 22, 31, 34, 36, 38, 39 and 43 of the Indictment are paragraphs which, according to the Defence's own prior representations, do not require rebuttal evidence.<sup>72</sup> Third, the Defence fails to acknowledge that in its 19 May Motion, it explicitly averred that Witnesses T116 and T129 are not capable of testifying with respect to paragraph 53 and Witness T150 is not capable of testifying with respect to paragraph 54 of the Indictment, a proviso that is not reflected in the above table. When these factors are considered, a very different picture of the impact of the Impugned Decision on the Defence case emerges, as is demonstrated in the table below:

<sup>71</sup> By "table", the Trial Chamber understands the Defence to mean "Proofing Chart".

<sup>72</sup> See 6 April Motion, para. 21 and table; Reconsideration Decision, para. 41.

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Witness whose scope of testimony was restricted by the Decision of 4 June 2010	Paragraphs of the Indictment the Defence identified as requiring rebuttal and about which the witness is capable of testifying which have been removed by the Decision of 4 June 2010	Paragraphs requiring rebuttal which have been left with less than 4 Defence witnesses after the Decision of 4 June 2010, according to the Defence Proofing Chart
T134	51	None
T150	16, 17, 19, 20, 26, 30, 33, 35, 37, 41, 45, 51, 52	None
T98	51	None
T95	51	None
T129	51	None
T116	51, 54	None
T61	51	None
T97	51	None
T110	24, 51	24
T76	26, 51	None

36. Accordingly, the Trial Chamber finds that the Defence has demonstrated good cause to allow Witness T110 to testify with respect to paragraph 24 of the Indictment. Moreover, while the Chamber categorically rejects the Defence contention that it can wilfully ignore its own Proofing Chart and reaffirms the principle that the Defence is expected to know its own case, the Chamber understands that occasionally a witness will not ultimately provide the testimony that was anticipated, for reasons that are not imputable to any error by the Defence. In such rare circumstances, and where an allegation remains unrebutted by adequate Defence evidence, the Trial Chamber considers that it may be in the interests of justice to allow another witness to provide such rebuttal. However, the onus lies on the Defence to clearly demonstrate why good cause exists to allow the supplemental testimony and specifically identify the points of the Indictment that the testimony will address.

37. In this regard, the Chamber notes that in the Instant Motion, the Defence has only provided concrete arguments to expand the scope of testimony of four witnesses: T95, T76, T150, and T116.<sup>73</sup>

38. The Defence submits that T95 "is an important background witness on Radio Rwanda".<sup>74</sup> However, the Chamber notes the Defence concession that "[m]any of the Defence witnesses

<sup>73</sup> Instant Motion, paras. 25-28.

<sup>74</sup> Instant Motion, para. 25.

spoke and will speak about the broadcasts"<sup>75</sup> and that the purpose of T95's testimony would merely be to "confirm the testimony of these other witnesses."<sup>76</sup> In addition to being vague as to which paragraph(s) of the Indictment such testimony would cover, the Chamber considers that sufficient evidence has been and will be tendered on the issue of Radio Rwanda broadcasts and thus the Defence has not shown why yet another witness testifying on this issue is warranted.

39. With respect to T76, the Defence asserts that this witness "has critical background information to provide" regarding Taba *commune*, Gitarama *préfecture*, and "is one of the very few individuals" who can provide particulars about certain allegations contained in paragraph 26 of the Indictment.<sup>77</sup> However, the Chamber notes that according to the Defence Proofing Chart at least 8 witnesses are able to provide evidence in respect of paragraph 26, and the Chamber is not satisfied that the Defence has clearly demonstrated why even more testimony on this paragraph is necessary. Furthermore, the Chamber finds that the proposal to allow T76 to provide "critical background information" is too vague to assist the Chamber in assessing whether to allow the scope of the witness' testimony to be expanded.

40. Regarding T150, the Defence argues that this witness would be able to confirm the whereabouts and thus corroborate the testimony of Witness T24, who testified with respect to a number of (unspecified) allegations against the Accused in Nyabikenke *commune*.<sup>78</sup> The Trial Chamber recalls its prior observations that apart from paragraph 53 of the Indictment, Witness T150 would provide testimony with respect to paragraphs of the Indictment where, according to the Defence Proofing Chart, significant rebuttal evidence already exists.<sup>79</sup> Therefore, the Trial Chamber considers that the Defence has failed to demonstrate with sufficient clarity and precision how T150 would provide probative evidence to areas of the Defence case where adequate rebuttal is currently lacking, and thus the Chamber reaffirms its prior holding that the scope of T150's testimony will be confined to paragraph 53 of the Indictment.

<sup>75</sup> Instant Motion, para. 25.

<sup>76</sup> Instant Motion, para. 25.

<sup>77</sup> Instant Motion, para. 26. The nature of T76's testimony regarding paragraph 26 has been redacted, out of an abundance of caution, to conceal the witness' protected identity.

<sup>78</sup> Instant Motion, para. 27.

<sup>79</sup> See tables contained in para. 35, *supra*; Reconsideration Decision, paras. 43-44.

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41. Finally, the Chamber is satisfied that the Defence has clearly demonstrated that Witness T19 did not in fact testify regarding paragraph 54 of the Indictment,<sup>80</sup> and for that reason allowing Witness T116 to testify in relation to that paragraph would not cause the Defence to exceed the cap of 4 witnesses imposed by the Reconsideration Decision. Therefore, the Trial Chamber will allow T116 to testify with respect to paragraph 54.

#### Refusal to Add Witnesses T56 and T161

42. The Trial Chamber notes that the argument raised by the Defence for the addition of Witnesses T56 and T161 is essentially a rehash of the same argument that was considered and rejected in the Impugned Decision.<sup>81</sup> Furthermore, the Trial Chamber is not persuaded by the Defence argument that new circumstances have arisen in light of the fact that three Defence witnesses who were supposed to testify in relation to paragraph 41 did not in fact do so. Even if this is so, the number of Defence witnesses scheduled to testify in relation to paragraph 41 would still greatly exceed four, which the Trial Chamber considers to be sufficient in light of the Defence contention that the Prosecution has not adduced any evidence with respect to most of the allegations contained in that paragraph.<sup>82</sup>

43. Moreover, the Trial Chamber recalls that in the Response the Prosecution submitted with respect to the Impugned Decision, it "strenuously contest[ed] the inclusion of witnesses T56 and T161"<sup>83</sup> to the Defence witness list, while providing reasoned arguments regarding the failure of the Defence to economically allot its resources and prepare its case despite ample time to do so,<sup>84</sup> which the Trial Chamber found persuasive in issuing the Impugned Decision.<sup>85</sup> Now, in the Instant Response, the Prosecution has performed an about-face, while offering no explanation for its departure from its prior stance, other than to assert that to allow Witnesses T56 and T161 to testify in relation to paragraph 41 of the Indictment would be "in the interests of justice".<sup>86</sup>

<sup>80</sup> Instant Motion, para. 28.

<sup>81</sup> Compare Instant Motion para. 32 with Impugned Decision paras. 33 and 34.

<sup>82</sup> 19 May Motion, para. 17.

<sup>83</sup> *Supra* fn 12, para. 10.

<sup>84</sup> *Supra* fn 12, para. 9.

<sup>85</sup> Impugned Decision, para. 34.

<sup>86</sup> Instant Response, para. 28.



44. For these reasons, the Trial Chamber is not persuaded that it abused its discretion in refusing to add Witnesses T56 and T161 to the Defence list, for the reasons stated in the Impugned Decision.<sup>87</sup>

### **Certification**

45. The Trial Chamber recalls that Certification is an exceptional remedy that requires the requesting party to demonstrate: 1) that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and 2) that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings. Even where both factors are present, Certification remains an exceptional remedy that lies within the absolute discretion of the Trial Chamber.<sup>88</sup>

46. The Trial Chamber finds that the Defence has not satisfied the test for Certification. First, the Defence's arguments that the issues raised in the Instant Motion would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial are substantially the same as those raised in support of Reconsideration, and the Chamber does not find these arguments to be any more persuasive in the context of a request for Certification. Second, the Defence's arguments that an immediate resolution of the issue may materially advance the proceedings consist largely of protestations to the effect that the Defence refuses to be bound by the representations it made in its Proofing Chart. Not only does this argument lack juridical merit, as has already been demonstrated above, but the Chamber does not see how it in any way purports to address the issue of whether an immediate resolution would materially advance the instant proceedings. For these reasons, Defence's request for Certification is denied.

### **FOR THESE REASONS, THE CHAMBER**

**GRANTS** the Instant Motion in part;

**RECONSIDERS** the Impugned Decision solely with respect to the scope of testimony that may be proffered by Witnesses T110 and T116;

<sup>87</sup> Impugned Decision, paras. 33-34.

<sup>88</sup> See para. 25, *supra*, and accompanying jurisprudence.

**ALLOWS** the Defence to examine Witness T110 in relation to paragraph 24 of the Indictment and Witness T116 in relation to paragraph 54 of the Indictment; and  
**DENIES** the remainder of the Defence Motion.

Arusha, 14 July 2010, done in English.



Solomy Balungi Bossa  
Presiding Judge



Bakhtiyar Tuzmukhamedov  
Judge



Mparany Rajohnson  
Judge

[Seal of the Tribunal]

